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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ELIAS GREEN, Defendant and Appellant.	B147419 (Los Angeles County Super. Ct. No. BA195865)

APPEAL from the judgment of the Superior Court of Los Angeles County. Mark V. Mooney, Judge. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Elias Green was charged with possession of marijuana for sale, possession of a firearm by a felon, and maintaining a place for the unlawful sale of a controlled substance. After appellant waived trial by jury, the trial court found him guilty only of possession of a firearm by a felon. He was sentenced to the three-year upper term plus one year for a Penal Code section 667.5, subdivision (b)[1] enhancement, for a total of four years. Execution of sentence was suspended, and appellant was placed on probation for three years.

Appellant contends that the evidence was insufficient to support his conviction. He also claims the trial court did not make a finding under section 667.5, subdivision (b), and therefore the enhancement imposed must be stricken. We disagree, and affirm the judgment.

DISCUSSION

1. Sufficiency of the evidence

a. Evidence by the prosecution

The prosecution evidence showed that appellant was the registered owner of a barbershop known as "Buck's Master Fades." The barbershop had been under federal narcotics task force surveillance for several months for alleged illicit narcotics transactions.

On December 3, 1999, the police arrived with a search warrant. Appellant was present, along with six other people, most of whom were barbers. One of the areas searched was a storage area approximately eight feet above the floor. One of the officers climbed into the storage area and found a bag of marijuana, paperwork relating to drug sales, barbering supplies, and a loaded shotgun. A scale was found in the back of the shop. When arrested, appellant was found to have a bag of marijuana on his person.

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[1] Unless otherwise stated, all statutory references are to the Penal Code.

No fingerprint evidence was offered by the prosecution to connect appellant to the shotgun, although evidence was introduced to show that appellant had a prior conviction for being a felon in possession of a firearm.

b. Defense evidence

Appellant has been a barber for 13 years. He claimed to also sell real estate, barbering supplies and clothing. Additionally, he stated that he did catering and public relations work. He testified that he did not own the shotgun, nor did he even know that it was in the storage area. He admitted that he had two prior felony convictions, and served 16 months in state prison for being a felon in possession of a firearm. He also admitted being on parole at the time of the present offense.

Appellant stated that all of the commissioned barbers had a key to the shop. Appellant said that he did not like to go into the storage area because it was dirty, and he liked to stay clean. However, Earl Lewis did go up there every day. Mr. Lewis was the only person with appellant's permission to do so.

Mr. Lewis confirmed that he would often be summoned by appellant to go up into the storage area to get certain supplies. Mr. Lewis stated that he had to either use a stepladder or jump up in order to get into the storage area, which was dirty and dusty.

Marlon Joiner, one of the barbers at the shop, testified that he saw appellant toss some toilet paper into the storage area, but never saw him go up there.

Henry Redmond is a handyman who installed tile in the shop a month or so before appellant's current arrest. Mr. Redmond said that during this time, he employed an assistant named Hector, who brought a shotgun to the shop, took it out of a box, showed it around, put it back in the box, and placed the box with the shotgun in the storage area.

c. Rebuttal

Officer Kenneth Williams testified that the shotgun that was retrieved from the storage area was not in a box.

d. Standard of review

A challenge to the sufficiency of the evidence requires that we examine the record to determine whether any rational trier of fact could have found appellant guilty beyond a reasonable doubt. (*In re Michael B.* (1983) 149 Cal.App.3d 1073, 1089.) The evidence against appellant must be reasonable, credible and of solid value. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) However, we are obligated to view the facts in a light most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We cannot reweigh the evidence or judge the credibility of witnesses. (*Ibid.*)

In the present matter, it is unquestioned that appellant is a felon. Thus, the evidence must show that he "exercised dominion and control over the weapon with knowledge of its presence and nature [citation]; but the specific intent to commit the unlawful act is not required. [Citations.]" (*People v. Cordova* (1979) 97 Cal.App.3d 665, 669; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.) Proof of guilt may be established by circumstantial evidence. (*People v. Cordova*, at pp. 669-670.)

e. Analysis

Both sides agree that there are two types of possession of a firearm, actual and constructive. They also agree with the trial court's finding that no actual possession was proved. Therefore, the evidence must show that appellant was in constructive possession of the shotgun. In order to have been in constructive possession, appellant must have knowingly "maintain[ed] control or [the] right to control" the weapon. (*People v. Newman* (1971) 5 Cal.3d 48, 52, disapproved on other grounds by *People v. Daniels* (1975) 14 Cal.3d 857, 862.)

Appellant asserts that the evidence fell short in the present matter because the premises were shared, with a host of other people having an equal or superior opportunity to access the storage area. Even though that may be true, there was sufficient circumstantial evidence to support the conviction.

Appellant was the sole owner of the shop and thus had constructive ownership of the shotgun, which was found in a storage area not frequented by anyone else without

appellant's permission. Also, appellant stated that he kept the public entry door locked because the shop was located in a gang area, and the gang "was on the warpath," supporting the inference that appellant kept the weapon for protection. Finally, Redmond's testimony regarding Hector is of no assistance to appellant. If Redmond's testimony was believed, it showed that the shotgun was in a box when placed in the storage area. However, the shotgun was loaded and not in a box when retrieved by the police, thus showing that someone removed the shotgun from the box and loaded it after Hector placed it there. As mentioned, appellant was the person in control of the storage area.

Accordingly, the circumstantial evidence adduced at trial amply supported the conclusion that appellant had knowledge of the existence of the shotgun and that he exercised dominion and control over the weapon.

2. The enhancement

a. The statutes

The problem that occurred here is that although a section 667.5, subdivision (b) enhancement was alleged, the trial court made no finding on it at the time the verdict was rendered.

Section 1158 provides that when a prior conviction has been alleged as a sentencing enhancement, and when the defendant has not admitted the prior conviction, the trier of fact is required to make a finding whether the allegation is true.[2]

Further, section 1167 provides that "When a jury trial is waived, the judge or justice before whom the trial is had shall, at the conclusion thereof, announce his findings

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[2] Section 1158 provides in pertinent part: "Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction."

upon the issues of fact, which shall be in substantially the form prescribed for the general verdict of a jury and shall be entered upon the minutes."

b. Procedural history

During the course of the trial, the prosecution introduced a "priors packet" pursuant to section 969b. The packet was received into evidence without objection.

After the parties concluded the presentation of evidence and argument, the trial court found appellant guilty of count II. No mention was made of the enhancement. The court then indicated that it was ready to pronounce sentence. However, appellant requested that the matter be put over in order to obtain a current probation report. The court set December 12, 2000 for sentencing. For some reason not explained by the record, the matter was continued until January 12, 2001. On that latter date, the court imposed the high term, and speaking for the first time to the enhancement, stated:

"And because the prior that has been pled and proven pursuant to 667.5(B) -- and the court does have that file with the court and the court does take judicial notice of the fact that the court will be imposing the additional one year. And that was -- the prior case was YA 031598. So it will be a four-year suspended sentence."

Neither side objected to the sentence.

c. Appellant's argument

Appellant contends that the trial court failed to make a finding as to the truth of the section 667.5, subdivision (b), enhancement, either at the time the verdict was pronounced or on the date judgment was entered. Appellant asserts that the suspended sentence that included a one-year enhancement was illegal and thus must be vacated.

d. Analysis

It is true that the trial court failed to make a finding as to the truth of the enhancement at the time the verdict was announced. However, the court rectified that

deficiency at the time of judgment, when the court stated that "the prior . . . has been pled and proven pursuant to 667.5(B)."

Even though not artfully expressed, that statement sufficiently conveyed the fact that the court found the prior to be true, based on the pleading and the "prior packet" that was received into evidence.[3] Therefore, this case is distinguishable from *People v. Gutierrez* (1993) 14 Cal.App.4th 1425 (*Gutierrez*), where the trial court made no findings at all on the enhancement, even at pronouncement of sentence.[4]

The issue is whether the trial court had the power to make that finding at the time of judgment, as opposed to making it at the time the verdict was announced.

We initially lay to rest respondent State of California's dual arguments that the issue was waived for failure to raise it at the time of judgment, and that in any event, as appellant was the one who requested that sentencing be put over, appellant invited the error.

If the trial court lost jurisdiction to impose the enhancement, then the sentence appellant received would be illegal. An illegal sentence may be challenged at any time,

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[3] Section 667.5, subdivision (b) provides in pertinent part: "[W]here the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction."

The term of felony probation or parole for felon in possession of a firearm (the crime appellant admitted as a prior) is five years or less. (§§ 1203.1, 3000.) Therefore, by admitting that he was on parole or felony probation for that prior offense, appellant conceded the elements of section 667.5, subdivision (b).

[4] In *Gutierrez*, counsel stipulated that the truth of the priors could be bifurcated to time of sentencing. However, the court forgot all about the priors until after sentencing was completed, when, in response to an inquiry by the court clerk, the court said "'so we will just stay the priors as to each defendant and should show that in the sentencing.'" (*Gutierrez, supra*, 14 Cal.App.4th at p. 1440.)

regardless of whether an objection was or was not made at the time of sentencing. (*People v. Chagolla* (1983) 144 Cal.App.3d 422, 434.)

Next, a criminal defendant does not have to be sentenced on the date the verdict is rendered. Instead, if the defendant is eligible for probation, the matter is to be referred to a probation officer for a report, and sentencing imposed within 20 days, unless further extended for good cause. (§ 1191.) Here, appellant asked for a probation report prior to sentencing. He was entitled to such a report, and we reject the contention that by doing so, he invited any error.

We do agree with respondent's assertion that the trial court had the power and the right to make a finding on the enhancement on the date judgment was pronounced. Although the better (and safer) practice would be to announce findings on all enhancements at the time a verdict is rendered, here the court was not precluded from doing so at the time of judgment.

The reason, of course, is that appellant suffered no prejudice. The same trier of fact who gave the verdict was the same person who rendered the judgment. This is not a case where the trial judge who heard the trial (and neglected to make a finding) was a different person from the trial judge who subsequently imposed sentence and found the enhancement to be true, as in *People v. Jackson* (1987) 193 Cal.App.3d 393, 404.

Rather, this case is similar to *People v. Pierson* (1969) 273 Cal.App.2d 130 (*Pierson*). In that matter, one of the charges against the defendant was of petty theft with a prior theft conviction. Trial was by the court. At the conclusion thereof, the court made an ambiguous statement as to whether it was finding against the defendant on the current theft charge and/or the prior theft. The appellate court stated that any error was a "nonprejudicial irregularity" in that it was "abundantly clear that the defendant did suffer the prior convictions. The People offered and the court received documents to prove the priors. They were admitted with a stipulation from the defense that defendant was the person named therein." (*Pierson*, at pp. 133-134.) The appellate court concluded that there was no basis to conclude that the trial court meant to find in favor of the defendant on the priors.

The same result occurs in the present matter. There is nothing in the record to infer that the trial court meant to find in appellant's favor on the enhancement. The priors packet relative to the enhancement was received into evidence. Appellant admitted the prior and further admitted that he was on parole at the time of this offense. The same trier of fact who heard the case and rendered the verdict was the same bench officer who pronounced judgment. Thus, even though the finding on the enhancement was not made until sentencing, appellant suffered no prejudice.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION.

_____, J.

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We concur:

_____, P.J.

BOREN

_____, J.

TODD